

# Government Plea to Supreme Court

Following is the text of a government application filed with the U.S. Supreme Court for an order enjoining The Washington Post from publishing certain portions of the secret Pentagon documents.

The Solicitor General, on behalf of the United States, pursuant to 28 U.S.C. 1651 and Rules 50 and 51 of the Rules of this Court applies for an order enjoining the respondents (The Washington Post (The Post) and certain of its officers) pending the filing and determination of a petition for a writ of certiorari, from publishing the following portions of material contained in a classified Department of Defense study of United States involvement in Vietnam: The items specified in the Special Appendix filed on June 21, 1971, with the United States Court of Appeals for the Second Circuit, in a case in that court captioned *The United States v. New York Times Company, et al.*, Docket No. 71-1617, decided June 23, 1971, or any of such additional items as the United States may specify with particularity by June 25, 1971.

This stay is designed to bring the judgment of the Court of Appeals for the District of Columbia Circuit in the present case into conformity with that of the Court of Appeals for the Second Circuit in the case involving The New York Times. The terms of the injunction we are seeking are identical to those of the Second Circuit in the *New York Times* case, except that in the *Times* case the injunction is pending a further *in camera* hearing and decision by the district court, to be rendered by July 3, 1971, whether disclosure of those items would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined" (see the text of that order, *infra*, p. 3). The *New York Times* has filed a petition for a writ of certiorari to review that injunction (No. 1873) and also has sought to vacate it; the United States has filed an opposition to the latter request. The stay here requested would pro-

vide equal treatment between The Washington Post and The New York Times, would preserve the remedy provided by the Second Circuit's Decision, and would eliminate uncertainty as to the identity of the specific documents which counsel for The Washington Post has undertaken will not be published.

A petition for rehearing seeking a modification of the court of appeals' judgment to provide this relief has been denied by that court. A copy of the petition is attached.

All of the items whose publication we are seeking to enjoin are classified "Top Secret-Sensitive," "Top Secret" or "Secret"; all of them are property of the United States that was illegally obtained from the government and is held by The Post without authority; the United States has the sole authority to decide whether to declassify the material or to authorize its publication, and has done neither.

The petition for certiorari will seek review of all or part of the judgment of the court of appeals, particularly insofar as that judgment affirmed the district court's denial of a preliminary injunction against the publication of that material, and failed to remand the case to the district court on the same terms as the remand ordered by the Court of Appeals for the Second Circuit in the *Times* case.

1. On June 18, 1971, the Washington Post published the first of a series of articles dealing with the United States' involvement in Vietnam. The articles admittedly were based upon the top secret and secret material whose further publication the United States is seeking to stop. At about 5:00 p.m. that day the United States filed suit in the United States District Court for the District of Columbia against The Washington Post and certain of its officers, seeking to enjoin further dissemination or publication of the material, and a return of the documents. The suit was similar to one filed by the United States in the United States District Court for the Southern District of New York, seeking to enjoin further publication of a similar series of articles by the New York Times based upon the same Defense Department studies. In the *Times* case, the district court originally issued a temporary restraining order; after a hearing on the merits, however, the district court held on June 19, 1971, that the United States was not entitled to enjoin further publication of this material by The Times. The court of appeals stayed such publication, pending the determination of the government's appeal from the district court, which the Second Circuit heard *en banc* on June 22, 1971. On June 23, 1971, that court of appeals entered the following order in the *Times* case:

Upon consideration by the court in banc, it is ordered that the case be remanded to the District Court for further *in camera* proceedings to determine, on or before July 3, 1971, whether disclosure of any of those items specified in the Special Appendix filed with this Court on June 21, 1971, or any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971, pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined, and to act accordingly, subject to the condition that the stay heretofore issued by this court, shall continue in effect until June 25, 1971, at which time it shall be vacated except as to those items which have been specified in the Special Appendix as so supplemented and shall continue in effect as to such items until disposition by the District Court.

On June 22, 1971, The Boston Globe published the initial article in a similar series also based upon the Defense Department material. Early in the afternoon of that day the United States filed suit to enjoin further publication by that newspaper. The district court granted a stay.

In the present case, the district court (Judge Gesell), on June 18, 1971, denied a temporary restraining order, but early in the morning on June 19, 1971, the Court of Appeals for the District of Columbia Circuit granted a stay. Pursuant to that court's order, the district court held a hearing on the government's application for a preliminary injunction on June 21, 1971. After an extensive hearing, at which the court heard testimony *in camera* by high ranking government officials with respect to the injury to the national security and foreign relations of the United States that further dissemination or publication of the material would cause, the court denied a preliminary injunction. The court of appeals granted a stay, pending the court's *en banc* hearing of the case on June 22, 1971. On June 23, 1971, the court of appeals affirmed.

2. This case and the one involving the *New York Times* present constitutional issues of great magnitude. The question is whether the prohibition in the First Amendment against the imposition of any prior government restraint upon the publication of the newspaper (see *Near v. Minnesota*, 283 U.S. 697) bars an injunction sought by the United States to prevent a newspaper from publishing classified documents whose disclosure would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined," which is the standard adopted by the Second Circuit in the *New York Times* case in continuing portions of its injunction against publication by The Times of similar articles based upon the same material. The issue obviously is of great national importance, and one whose resolution by this Court is clearly appropriate.

Its importance is attested by the fact that the Courts of Appeals for both the District of Columbia and the Second Circuits *sua sponte* heard the government's appeal *en banc*. Unless a stay is granted, this case become moot but, even

more seriously, the damage to the national security and the conduct of our foreign relations that the government is seeking to prevent by this action will irrevocably be placed beyond repair.

In cases such as this, the touchstone for injunctive relief is the public interest. Here two vital facets of that interest are involved: (1) the interest of the government in protecting the country against disclosure of vital and sensitive information of the highest security classification whose disclosure would pose a "grave and immediate danger to the security of the United States"; and (2) the interest of a newspaper in publishing information to which it believes the public is entitled. In balancing the equities in favor of, and in opposition to a stay, the compelling consideration is that a brief delay in publication of this material by the Post would not prejudice the public interest, since such delay would not detract from the importance of the material or diminish its significance if it ultimately were published. On the other hand, the national interest the government is seeking to protect by this suit would be immediately and completely defeated if this classified material were made public. The public interest requires a stay.

The application for a stay should be granted. If it is granted, the government is prepared to meet any schedule the Court deems appropriate for a prompt hearing of the case. Indeed, the Court may deem it appropriate to treat this application as a petition for a writ of certiorari.